

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Engineering Division
Honolulu, Hawaii 96813

February 11, 2010

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

**Authorization to Enter Into a Use and Access Agreement
With the City and County of Honolulu for the Construction of
Dispersion Channels Structures, Round Top Drive, Oahu**

The Engineering Division desires to enter into a Use and Access Agreement with the City and County of Honolulu for the construction of Dispersion Channel Structures along Round Top Drive, Oahu.

BACKGROUND:

During the March 2006 heavy rains, two (2) Manoa homes, at 2750 and 2718 Puuhonua Street were flooded. The source of the flood water was determined to originate from two (2) drainage culverts on Round Top Drive. The City and County of Honolulu owns and maintains Round Top Drive but has denied ownership of the drainage system.

The point discharge of the drainage culverts carved large trenches into the hillside. These trenches directed the rain runoff from Round Top Drive directly to the homes below. The State DLNR will construct a dispersion channel at each drainage outlet. These dispersion channels are designed to spread out the runoff water over a large area minimizing the potential of creating new trenches that could flood the homes below.

PROPOSED AGREEMENT:


The City and County of Honolulu, Department of Facility Maintenance has agreed to maintain the dispersion channels provided that the State DLNR retains ownership of the structures. The design and construction of the dispersion channels will be funded with funds authorized for 2006 Storm Damage Relief.

A copy of the Draft Agreement, which is subject to change, is attached.

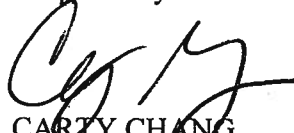
RECOMMENDATION:

That the Board authorize the Chairperson to sign the Use and Access Agreement for the Dispersion Channel project and other necessary documents pertaining to the project, subject to the Deputy Attorney General's approval as to form.

APPROVED FOR SUBMITTAL:


LAURA H. THIELEN, Chairperson

Respectfully submitted,


CARTY CHANG
Acting Chief Engineer

ITEM L-3

)
)
)
)
)
)
)
)
)
)
)
)
)
)
)

Total Number of Pages:	
LOD No.	Tax Map Key No.

THIS AGREEMENT is effective as of _____,
by and between the STATE OF HAWAII, by its Board of Land and
Natural Resources, (hereinafter referred to as the "Grantor") and
CITY AND COUNTY OF HONOLULU, DEPARTMENT OF FACILITY MAINTENANCE,
whose principal place of business and post office address is 1000
Ulu Ohia Street, Kapolei, Hawaii 96707 (hereinafter referred to
as the "City").

RECITALS:

WHEREAS, the Grantor is the owner of the land identified in Tax Map Key No. (1) 2-9-018:001, and is more particularly delineated on Exhibit "A" attached hereto and made a part hereof (hereinafter referred to as the "Property"); and

WHEREAS, the City desires to enter and use a portion of the Property, as described and delineated on Exhibit "B" (consisting of a site plan) attached hereto and incorporated herein by reference (hereinafter referred to as the "Premises"), for purposes of maintaining two State-owned concrete dispersion channels designed to spread out the point discharge from two drainage outlets, (hereinafter collectively referred to as the "Dispersion Channel Areas"); and

WHEREAS, the Grantor does not object to granting the City use and access rights over the Premises provided the City fully complies with the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the mutual covenants and promises herein made, the parties do hereby agree as follows:

AGREEMENT:

1. Grant of Use and Access Rights. The Grantor hereby grants the City the perpetual non-exclusive right to use, occupy, and access to the Premises for the purpose of inspection and maintenance of the Dispersion Channel Areas.

2. Maintenance. The City shall, at its sole cost and expense and on a routine schedule, maintain the Dispersion

Channel Areas and assist in keeping the Premises in a safe, clean, sanitary, and orderly condition. The City shall not make or knowingly permit or suffer any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the Premises.

3. **Repair.** The City shall not damage, undermine or otherwise destroy any portion of the Property and the Premises, including, without limitation, the Dispersion Channel Areas or any of Grantor's improvements situated on or near the Premises or any equipment or appurtenances relating thereto. The City shall, at its sole cost and expense, repair, restore and reconstruct that portion of said Property and Premises so damaged, undermined or destroyed, including any and all affected improvements, equipment and appurtenances, by the City's use of the Premises.

4. **Reservation of Rights.** The Grantor reserves unto itself the right of full use and enjoyment of the Premises and to grant to others rights and privileges for any and all purposes affecting the Premises, all without charge by and without the consent of the City, provided that such use by the Grantor and/or third parties does not unreasonably interfere with the City's rights to access and use the Premises under this Agreement. The City shall take steps necessary to ensure that the City's exercise of the rights and privileges granted hereunder does not cause any substantial interference with the Grantor's operations in or near the Premises and Property.

5. City's Responsibility. The City shall at all times with respect to accessing and using the Premises area use due care for public safety and agrees to indemnify, defend, and hold the Grantor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or negligent omission on the part of the City relating to the City's use, maintenance, or enjoyment of the Premises area; and 2) any failure on the part of the City to maintain the Premises and sidewalks, roadways and parking areas adjacent thereto in the City's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the City to maintain the Premises in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the City's non-observance or non-performance of any of the terms, covenants, and conditions of this Agreement or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.

6. Work Within or Affecting the Premises. If the Grantor decides to perform work of any kind within, on, over, under, across, near, or affecting the Premises, the Grantor will coordinate such work with the City. The City shall not unreasonably prevent the Grantor from performing such work,

provided, however, that the Grantor will take certain protective measures to assure that such work does not unreasonably interfere with the City's use of the Premises.

7. Assignment. The City's rights under this Agreement shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of, directly or by operation of law, except with the prior written consent of the Grantor.

8. Default.

a. Notice of default. If the City defaults on or otherwise fails to perform its obligations under this Agreement, the Grantor will issue a written notice of default to the City by hand-delivery or first-class mail.

b. City to cure defaults. Any and all defaults or failures to perform contained in such notice of default must be resolved and remedied to the Grantor's reasonable satisfaction within forty-five (45) days of the City's receipt of the Grantor's written notice to the City or such further time as may be authorized by the Grantor in writing; provided, however, that if the nature of such default is such that the cure cannot reasonably be completed within forty-five (45) days or such further time, the City may have such additional time as may be reasonably necessary to cure such default, so long as the City shall have commenced such cure within such forty-five (45) days or additional time period and shall diligently complete such

cure. The City's failure to inspect and maintain the Dispersion Channel Areas in accordance with this Agreement shall be deemed a default of this Agreement.

c. Remedies for failure to cure. If the City fails to cure said defaults or failures to perform within the required time, the Grantor itself may, but shall not be obligated to, cure or remedy said defaults or failures to perform and charge any reasonable costs and expenses incurred in performing said cure or remedy to the City, who shall pay said costs and expenses to the Grantor within 60 days after receiving notice from the Grantor. If the City fails to cure said defaults or failures to perform within the required time period, the Grantor may terminate this Agreement and the City's rights under this Agreement to use the Premises. If the City defaults or fails to perform as required under this Agreement, the Grantor shall be entitled to all remedies available under this Agreement and by law, which remedies shall be cumulative and not exclusive.

9. Termination. This Agreement may be cancelled in whole or in part at any time by mutual written agreement of the parties hereto.

10. Hazardous Materials.

a. Grantor's pre-approval required. The City shall not cause or permit the presence, escape, disposal, discharge or release of any hazardous materials except as permitted by law.

The City shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto and/or into the Premises any such materials except to use in the ordinary course of the City's business, and then only after written notice is given to the Grantor of the identity of such materials and upon the Grantor's consent, which consent shall not unreasonably be withheld. As used in this paragraph 9, the "presence, escape, disposal, discharge or release of hazardous materials" includes, but is not limited to oil, fuel, PCB spillage or leakage, improper waste oil disposal and pollution of any water attributed to the City's (a) operations and activities on or connected with the Premises or (b) use and access of the Premises.

b. **The City's responsibility.** If any lender or governmental agency shall ever require testing to ascertain whether or not the City has caused or permitted the escape, disposal, discharge or release of hazardous materials, the City shall be responsible for the reasonable costs thereof.

c. **"Hazardous materials" definition.** For the purpose of this Agreement, "hazardous materials" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, the Comprehensive

Environmental Response, Compensation, and Liability Act, and the Federal Clean Water Act, all as amended, or any other federal, state or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

d. City's clean-up obligation. Upon termination of this Agreement, the City shall, at its sole cost and expense, if required by law, clean up and decontaminate the Premises and remove all hazardous materials therefrom, including, without limitation, clean-up of surface and ground waters and making the soil free and clear of all such contaminants and hazardous material.

11. Removal upon termination. Upon any full or partial termination or cancellation of this Agreement, the City shall, at its sole cost and expense:

a. Remove and restore. As to any and all portions of the Dispersion Channel Areas on, within, under, over or across such Property and Premises, restore the Property and Premises to, as much as reasonably possible and within a reasonable time, as good a condition as existed as of the effective date of this Agreement, reasonably satisfactory to the Grantor, and if the City fails to so restore the Property and Premises, the Grantor shall have the right to charge the City reasonable costs and expenses incurred by the Grantor in completing and accomplishing

such restoration, including, but not limited to, any costs the Grantor incurs in removing and disposing of the City's property. This provision shall survive the termination of the Agreement.

12. Compliance With Laws. The City, at all times during the term of this Agreement, shall comply with all of the requirements of the federal, state, and county laws, statutes, ordinances, rules and regulations, now in force or which may hereafter be in force.

13. Binding Effect. All provisions contained in this Agreement shall be binding upon and inure to the benefit of the respective parties, their successors and permitted assigns, and officers, agents, and employees.

14. Singular, Plural. All words used herein in the singular number shall extend to and include the plural. All words used in any gender shall extend to and include all gender.

15. Headings. The headings and captions herein are for convenience of reference only and are not intended to fully describe, define or limit the provisions of this Agreement of which they may pertain.

16. Attorney's Fees and Expenses. In case the Grantor shall, without any fault on its part, be made a party to any litigation commenced by or against the City as a result of this Agreement (other than condemnation proceedings), the City shall pay all costs, including reasonable attorney's fees and expenses

incurred by or imposed on the Grantor; furthermore, the City shall pay all costs, including reasonable attorney's fees and expenses, which may be incurred by or paid by the Grantor in enforcing the covenants and conditions of this Agreement, or in the collection of delinquent rental, fees, taxes, and any and all other applicable charges attributed to said Dispersion Channel Areas.

17. Non-discrimination. The City covenants, for itself, its successors and assigns, that the use and enjoyment of the land herein granted shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

18. Relocation. Should future development necessitate a relocation of the Dispersion Channel Areas granted herein, or any portion thereof, the relocation shall be accomplished at the City's own cost and expense; provided, however, that if other lands of the Grantor are available, the Grantor will grant to the City without payment of any monetary consideration, a substitute Dispersion Channel Areas of similar width within the reasonable vicinity of the original alignment, which substitute Dispersion Channel Areas shall be subject to the same terms and conditions as that herein granted and as required by law.

19. Time Is Of The Essence. Time is of the essence in this Agreement and if the City shall abandon the Premises, or if this Agreement and Premises shall be attached or taken by operation of law, or if any assignment is made of the City's property for the benefit of creditors, or if City shall fail to observe and perform any of the covenants, terms, and conditions contained in this Agreement and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) calendar days after delivery by the Grantor of a written notice of breach or default, by personal service, registered mail or certified mail to the City at its last known address and to each mortgagee or holder of record having a security interest in the Premises, the Grantor may, subject to the provisions of section 171-21, Hawaii Revised Statutes, at once re-enter the Premises, or any part, and upon or without the entry, at its option, terminate this Agreement without prejudice to any other remedy or right of action for any preceding or other breach of contract; and in the event of termination, at the option of Grantor, all improvements shall remain and become the property of the Grantor or shall be removed by City.

20. Withdrawal. The Grantor reserves the right to withdraw the Dispersion Channel Areas for public use or purposes, at any time during this Agreement upon the giving of reasonable notice by the Grantor and without compensation.

21. **No Mortgage.** The City shall not mortgage or pledge the Premises, any portion, or any interest in this Dispersion Channel Area without the prior written approval of the Chairperson of the Board of Land and Natural Resources and any mortgage or pledge without such approval shall be null and void.

22. **No Parking.** The Dispersion Channel Areas shall not be used at any time by the City, its guests or invitees for parking purposes.

23. **Trimming.** The City shall at all times during the term of this Agreement, trim all vegetation growing within, over, or onto the Dispersion Channel Areas so that it does not present a threat to public safety by creating or contributing to roadway, waterway, or pedestrian obstruction, visual obstruction to operators of vehicles, fire hazards, or interference with or downing of power lines.

24. **Environmental Impact Regulations.** The City shall comply with all applicable federal and state environmental impact regulations.

25. **Pollution And Contamination Control Measures.** The City shall maintain and employ debris, pollution and contamination control measures, safeguards and techniques to prevent debris, pollution or contamination to the ocean waters, streams or waterways resulting from the City's, its invitee's, or its agent's use, maintenance, repair and operation of the Dispersion

Channel Areas, and shall take immediate corrective action in the event of such pollution or contamination to immediately remove the cause of such pollution or contamination, and shall immediately clean the Premises area and its surrounding waters of such pollutant or contaminant and restore to the Grantor's satisfaction the areas affected by such pollution or contamination, all at the City's own cost and expense.

Approvals. The Premises area is encumbered by Governor's Executive Order No. 909 to the Department of Land and Natural Resources, Division of Forestry and Wildlife for Honolulu Watershed Forest Reserve purposes, and therefore the Agreement is subject to the Department of Land and Natural Resources, Division of Forestry and Wildlife's approval. Said approval was obtained on _____.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

STATE OF HAWAII

APPROVED AS TO FORM:

Deputy Attorney General

Dated: _____

By _____
Name: _____
Title: Chairperson, Board of
Land and Natural Resources

Approved by the Board of
Land and Natural Resources
at its meetings held on
_____.

APPROVED AS TO FORM
AND LEGALITY:

Deputy Corporation Counsel

Engineer

Dated: _____

**CITY AND COUNTY OF HONOLULU
DEPARTMENT OF FACILITY
MAINTENANCE**

By _____
Name: _____
Title: Director and Chief

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

On this _____ day of _____, 20____,
before me appeared _____,
to me personally known, who, being by me duly sworn, did say that
_____ is the Director and Chief
Engineer of the CITY AND COUNTY OF HONOLULU, a municipal
corporation, Department of Facility Maintenance, and that the
seal affixed to the foregoing instrument is the corporate seal of
said municipal corporation, and that the foregoing instrument was
signed and sealed in behalf of said municipal corporation by
authority of the City Council of said City and County of
Honolulu, and said _____
_____ acknowledged said instrument to be the free
act and deed of said municipal corporation.

Notary Public, State of Hawaii

My commission expires: _____

Doc. Date: _____ #Pages: _____	
Notary Name: _____ Circuit _____	
Doc. Description: _____ _____	
Notary Signature _____	Date _____

JUL 6 1938
 JUL 8 1939
 JUL 18 1940
 MAY 8 1940
 JAN 17 1941
 MAY 16 1946
 OCT 24 52
 FEB 21 54

ROUND TOP FOREST RESERVE
 SECTION 5

Mary Moran
 79,718.4
 (61,310.4)

INSERT
 Scale: 1 in. = 100 ft.

ROUND TOP FOREST RESERVE
 SECTION 5

DRIVE
 ADDITION

SEE
 INSERT
 136

State of Hawaii
 58.67 acs.
 (Board of Commissioners of Agriculture & Forestry)
 Exec. Ord. No. 900
 (51,987 acs)

FOREST

Grant 3759

PLAT 16
 CASTLE TERRACE TRACT

PUUHONUA ST.

KAULUMANU ST.

FERDINAND AVENUE

PLAT 08

PLAT 09

MANOA, HONOLULU

DWG No. 1147
 By: [Signature]
 Source: Survey Dept. of the Hawaiian Islands
 Appr. by: [Signature]
 Revised by: [Signature]
 Appr. by: [Signature]

FIRST DIVISION		
ZONE	SEC.	PLATS
2	9	18
CONTAINING		PARCELS
Scale: 1 in. = 100 ft.		

ADVANCE SHEET
 SUBJECT TO CHANGE

PRINTED

EXHIBIT "A"

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
ENGINEERING DIVISION

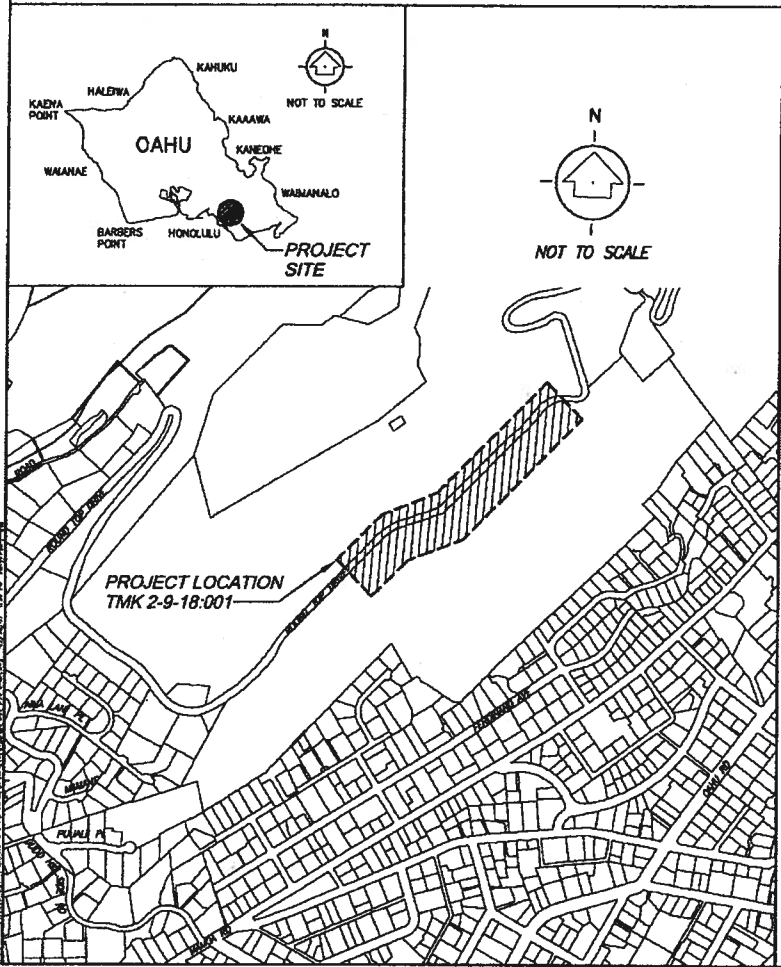
DISPERSION CHANNELS
ROUND TOP DRIVE, MANOA

HONOLULU, OAHU, HAWAII
TAX MAP KEY 2-9-18:001

INDEX TO DRAWINGS

DWG NO.	SHT NO.	DESCRIPTION
C-1	1	TITLE SHEET, INDEX TO DRAWINGS, LOCATION MAP, APPROVALS, TYPICAL CROSS SECTION
C-2	2	GENERAL NOTES
C-3	3	GENERAL SITE PLAN
C-4	4	SITE PLAN - 1
C-5	5	SITE PLAN - 2
C-6	6	SITE PLAN - 3
C-7	7	DISPERSION CHANNEL DETAILS
C-8	8	DETAILS
C-9	9	EROSION CONTROL PLAN
S-1	10	STRUCTURAL NOTES AND SECTION
S-2	11	SECTIONS AND DETAILS
L-1	12	LANDSCAPE NOTES AND DETAIL
L-2	13	LANDSCAPE PLAN - 1
L-3	14	LANDSCAPE PLAN - 2
L-4	15	LANDSCAPE PLAN - 3

LOCATION MAP



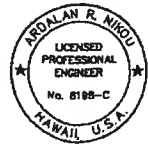
APPROVALS

ERIC T. HIRANO
CHIEF ENGINEER, ENGINEERING DIVISION
DEPARTMENT OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

DATE

PRE-FINAL

EarthTech
A Tyco International Ltd. Company

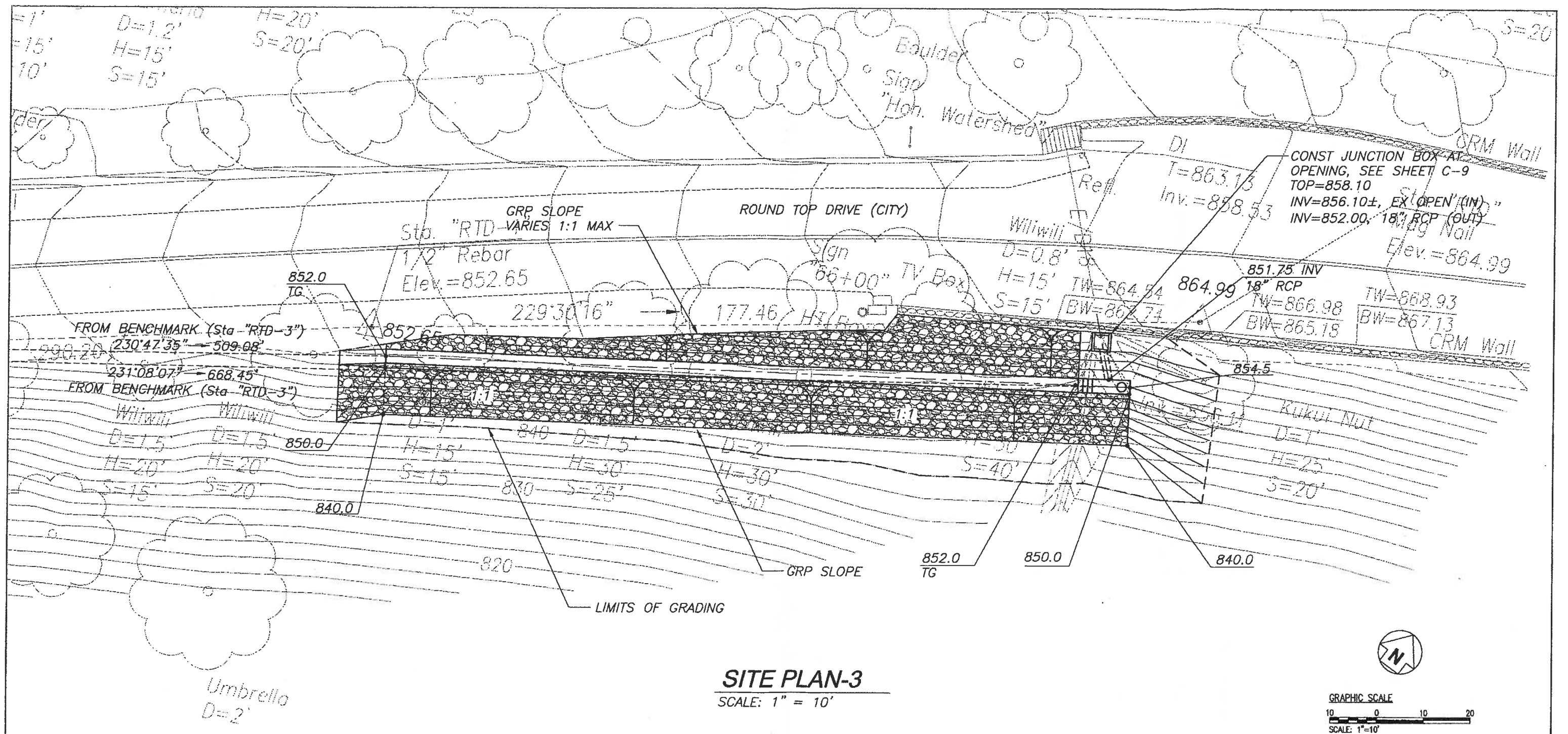


THIS WORK WAS PREPARED BY ME
OR UNDER MY SUPERVISION AND
CONSTRUCTION OF THIS PROJECT
WILL BE UNDER MY OBSERVATION.

Signature
1/30/08
Expiration Date
of the License

SYN	DESCRIPTION	DATE	APP'D
REVISIONS			
STATE OF HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES ENGINEERING DIVISION			
DISPERSION CHANNELS ROUND TOP DRIVE, MANOA TITLE SHEET			
DESIGNED: RKH	SUBMITTED:		
DRAWN:	DATE:		
CHECKED: ARN	CHIEF DESIGN & INSP. ENGINEER		
APPROVED:	FILE NO.		
DATE:			CHIEF ENGINEER

C-1



SITE PLAN-3

SCALE: 1" = 10'



GRAPHIC SCALE



PRE-FINAL

 A Tyco International Ltd. Company	SYM		DESCRIPTION	DATE	APP'D
	REVISIONS				
	STATE OF HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES ENGINEERING DIVISION				
	DISPERSION CHANNELS ROUND TOP DRIVE, MANOA SITE PLAN - 3				
	DESIGNED: RKH		SUBMITTED:		
DRAWN:		CHIEF DESIGN & INSP. ENGINEER			
CHECKED: ARN		DATE:			
APPROVED:		CHIEF ENGINEER		FILE NO.	
DATE:					

C-6

